FILE COPY

No. 791

SUPREME COURT OF THE UNITED STATES

October Term, 1958

LAMAR BATH HOUSE COMPANY, BUCKSTAFF BATH HOUSE COMPANY, OZARK BATH HOUSE COMPANY, QUAPAW BATH HOUSE COMPANY, MAURICE BATH COMPANY, SUPERIOR BATH HOUSE COMPANY, FORDYCE BATH HOUSE and HALE BATH HOUSE *Appellants*

v. No.

CITY OF HOT SPRINGS, ARKANSAS, HOT SPRINGS SEWER COMMITTEE, RAY S. SMITH, SR., THOMAS W. STONE, and C. T. BATES, MEMBERS OF THE HOT SPRINGS SEWER COMMITTEE, and ATTORNEY GENERAL OF THE STATE OF ARKANSAS *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

MOTION OF APPELLEES, CITY OF HOT SPRINGS, ARKANSAS, HOT SPRINGS SEWER COMMITTEE, and RAY S. SMITH, SR., THOMAS W. STONE and C. T. BATES, MEMBERS OF THE HOT SPRINGS SEWER COMMITTEE, TO DISMISS

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Appellees, City of Hot Springs, Arkansas, Hot Springs Sewer Committee, and Ray S. Smith, Sr., Thomas W. Stone, and C. T. Bates, members of the Hot Springs Sewer Committee, pursuant to Rule 16 of the Revised Rules

of this Court, move to dismiss the appeal in the above entitled case on the grounds that the appeal does not present a substantial federal question.

STATEMENT OF CASE

This case is an appeal from a final judgment and decision of the Supreme Court of the State of Arkansas,[1] affirming on direct appeal and reversing in part on cross appeal, a decree of the Chancery Court of Garland County, Arkansas,[2] holding that appellants must pay sewer service charges for their use of appellees sewer system.

The eight appellants, (one partnership, one individual, and six Arkansas Corporations) operate eight public bath houses located on land belonging to the United States as a part of the Hot Springs National Park located in Garland County, Arkansas. "Exclusice Jurisdiction" of the Park was ceded to the United States by the State of Arkansas in 1903, reserving to the State however, "the right to tax all structures and other property in private ownership on the Hot Springs Reservation—".[3] The United States, by act of Congress in 1904, accepted the cession and assumed "sole and exclusive" jurisdiction, subject to the reserved right of the State to tax structures and other property in private ownership.[4]

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1 ____ Ark. ____, 315 SW 2d 884. Entered June 16, 1958. Rehearing denied September 29, 1958. Not yet officially reported, but printed in The Law Reporter, Little Rock, Arkansas, Vol. 103 No. 23, p 875, June 16, 1958. Copy appears as appendix A-2, A-3 and appendix A-3, pp A-6—A-13 of appellants' statement as to jurisdiction.

2 Entered May 21, 1957. Copy appears as appendix A-1, pp A-1—A-4 of appellants' statement as to jurisdiction.

3 Act of Arkansas February 21, 1903, Act 30, 2 Ark. Stat. 1947, annotated, Sec. 10-1123. This act appears as appendix B-5, p A-28 of Appellants' Statement of Jurisdiction. The Statement as to jurisdiction does not print the act in its entirety, and omits the reservation by the State of Arkansas of power to tax structures and other property in private ownership.

4 Act April 20, 1904, 33 Stat. 187, 16 U. S. C., Sec. 372. This act appears as appendix B-6, pa.-29, of Appellants' Statement as to Jurisdiction, but the confirmation of the State's right of taxation is omitted by Appellants.

The bath houses operated by appellants are all situated on the east side of Central Avenue, the principal street of Hot Springs, Arkansas, facing a part of the business district of the City on the west side of Central Avenue. The city limit is the east side of Central Avenue directly in front of appellants' bath houses.[5]

The appellants operate these bath houses under 20-year leases from the United States Department of the Interior. There are two types of leases. The older lease form, under which appellants Ozark, Quapaw, Superior and Hale operate, recognize the ownership by the lessees of the buildings and fixtures, and provide for reimbursement to the lessee for the value of improvements upon expiration of the lease, if the premises are leased to another lessee. (See Ozark Bath House Company Lease, Sec. 2, p 1, Sec. 4, p 2, and Sec. 12, p 5, Stip. Ex. 2.) The newer lease form, under which appellants Buckstaff, Fordyce, Lamar and Maurice operate, recognizes that the lessees have a "possessory interest" in all of lessee's improvements on the leased premises, for which lessee will be compensated at the termination of the lease. (See Buckstaff Bath House Lease, Sec. 5 (a) & (b), p 4 and Sec. 11 (a) and (b), pp 7 and 8, Stip. Ex. 1.)

Appellants assert that it is the policy, responsibility and obligation of the Federal Government, through the National Park Service to provide for sewage disposal for the entire Park, including appellants' sewage. Neither of the two forms of lease mentions any obligation of the government in connection with sewage disposal. On the contrary, the older form specifically provides that: "The operator shall also provide and maintain, at its own expense, ample and safe sewage and drainage, with all necessary appliances, conducted on the best principle to

[5] Stipulation, Exhibit 5, Map of Hot Springs National Park. Appellants' bath houses are shown on this map as numbers 25, 13, 16, 12, 22, 19, 10 and 14.

secure sanitary conditions, and particularly to protect from contamination all springs situated on said site, and keep the same in such condition, to the satisfaction of the superintendent." (Stip. Ex. 2, Sec. 6, p 3.) The newer lease form does not mention sewage disposal.

All eight of the appellants secure their water for ordinary purposes, other than therapeutic baths, from the Hot Springs Municipal Water System and pay the prescribed charges for such water service. In addition to the city water used by appellants, they use large quantities of hot mineral water procured from the Hot Springs located on the Park to provide therapeutic bath treatments for their customers.

(See Schedule of Water used by bath houses, Stip. Ex. 10.) Water rates based on 25c per thousand gallons for all hot mineral water used are paid by appellants to the Secretary of the Interior under provisions of their leases. (See Stip. Ex. 1, Sec. 8 (2), p 5 and Stip. Ex. 2, Sec. 3 (b), 1st Amendment, p 2.)

All city water used by appellants for sanitary purposes and all hot mineral water used by them is discharged into the sewer system of the City of Hot Springs and is processed in a sewage disposal plant operated by the City. The volume of city water discharged into the city sewers by appellants in 1952 was 4,452,800 gallons and in 1953 was 4,971,100 gallons. The volume of hot mineral water discharged by appellants into the city sewer system for the year 1952 was 52,912,700 gallons and for the year 1953 was 50,834,700 gallons (Stip. Ex. 10.) For each of these two years, appellants use of the city sewers amounted to approximately 7.5% of the total annual city sewage flow. (Opinion of Supreme Court of Arkansas, appendix A-3, Statement of Jurisdiction, p A-7.)

The sewer service charges, which the Supreme Court of Arkansas has required appellants to pay, are based upon appellants' use of the city Sewer System as above set out.

Prior to the year 1935, the City had no sewage disposal plant. Sewage from the National Park, including appellants' sewage, was emptied into a main constructed by the Department of the Interior which carried the sewage beyond the park boundaries and emptied into a creek running through a portion of the City. City sewer mains also emptied into this creek, which flows into Lake Hamilton, a lake formed by a dam across the Ouachita River about 5 miles from the city.

In 1934, after negotiations in 1933, the City of Hot Springs, entered into an agreement with the National Park Service, Department of the Interior, relative to construction of a sewage disposal plant. Recognizing that the Hot Springs Reservation, including appellant bath houses located thereon, contributed a large percentage of the city's sewage, the Park Service agreed to pay 22% of the construction cost as its share of such cost and an additional 5% of the construction cost in lieu of maintenance and operation charges. The aggregate amount contributed by the Park Service was $82,000.00. Appellants furnished no part of the consideration.

In consideration of this contribution, the city made the following agreements:

1. That the Government be not charged for any service or use of the system at any time in the future.
2. That the cost of all repairs, alterations, maintenance and operation of the system be borne by other than the United States government sources.

3. Necessary replacements of the entire plant due to natural or human destruction not to be considered a part of paragraph '2'.

The balance of the cost of construction of the sewage collection and disposal system was paid partly by the U. S. Public Works Administration, and partly by City Bond Issue of $175,000.00 financed by a 1.5-mill ad valorem tax on all taxable property in the city.

In 1934 the County Clerk extended the 1.5-mill tax against the property of appellants assessed for taxation. In July, 1935, the appellants in this case filed an action in the Garland Chancery Court to restrain collection of the bond millage, setting up the contract as a defense. A temporary restaining order issued, and the matter lay dormant until 1945 when the city filed a motion to dissolve the injunction and for judgment for past due taxes. After a full trial, including taking of testimony, the Chancery Court held that the appellants were "United States Government Sources", within the meaning of the agreement with the city, and enjoined the assessment against the collection of the 1.5-mill tax from appellants. The city did not appeal.

By 1952, it became apparent that the city sewage disposal plants were obsolescent, inadequate and heavily overloaded, thus creating a serious pollution problem in Lakes Hamilton and Catherine. A thorough engineering study was made, resulting in recommendations to enlarge, overhaul and reconstruct the disposal plants and to change entirely the method of purifying the city's sewage. To accomplish this improvement, a bond issue in the amount of $786,000.00 was authorized, to be financed by a sewer service charge under the provisions of Act 132 of 1933 (Sec. 19-4101 et seq., Ark. Stat. 1947). Prior to that time, the city had never levied any sewer service charge.

The sewer service charge rates were set out in Ordinance No. 24446.[6] After the completion of the work, bills for sewer service charges were sent to users of the system, including appellants. Charges to appellants were calculated upon the total volume of sewage discharged by them into the city sewer system, including both city water and hot mineral water furnished by the National Park Service.

Appellants refused to pay the sewer service charges, and in the summer of 1955 filed an action to enjoin collection of the charges relying on the 1934 contract with the city, *res adjudicata* in the previous action, and estoppel, and asserting that the application of the sewer service charges to them was in violation of the exclusive jurisdiction of the Federal Government over the Park denied them due process of law and equal protection of the laws, and unconstitutionally impaired the obligation of the 1935 contract. Appellees pleaded that the contract was *ultra vires* as applied to the sewer service charges and cross complained for judgment for the full amount of the unpaid sewer service charges plus statutory penalties and attorney's fees.

The trial court held that the 1934 contract was *ultra vires* as applied to the present sewer service charges and that appellants were liable for the charges calculated only on the volume of city water discharged into the sewers and disallowed charges calculated on the volume of hot mineral water discharged into the city sewers, and penalties and attorney's fees.

The Supreme Court of Arkansas affirmed on direct appeal, holding the 1935 contract *ultra vires* as applied to the present city sewer charges, and denying appellants other grounds for relief, and reversed the trial court in part on cross appeal, holding that appellants were liable

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[6] City of Hot Springs Ordinance No. 2444, adopted August 17, 1953, appendix B-1 pp A-16—A-18 Appellants' Statement as to Jurisdiction.

for sewer service charges based upon all sewage discharged into the city system, including hot mineral water discharged into the system by appellants.

THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Briefly stated, the questions presented by appellants are:

1. Application of city sewer charges to appellants violated (a) the exclusive and paramount federal authority and jurisdiction over the park under Article 1, Sec. 8, Clause 17, and Article 4, Sec. 3, Clause 2 of the United States Constitution, and (b) Federal immunity as to property and functions under the Constitution.

2. (a) Imposition of the charges on appellants as a personal liability violates the due process clause of Section 1 of the 14th amendment to the Constitution of the United States, and (b) imposition of the charges outside the jurisdiction of the city and within that of another government violates due process.

3. Appellants have been denied equal protection of law in that sewer service charges have been imposed upon them and not upon the National Park Service and the United States.

4. Imposition of sewer service charges on appellants unlawfully impairs the obligation of the 1935 contract between the Department of the Interior and the city of Hot Springs, in violation of Article 1, Sec. 10, Clause 1, of the Constitution of the United States.

None of the questions presented are substantial.

I

Imposition of sewer service charges on appellants does not violate federal authority, jurisdiction or immunity over the park area.

Even if the sewer service charge were a tax levy, it could be applied to appellants by authority of the State's reserved right to tax "structures and other property in private ownership on the Hot Springs Reservation".[7] But the sewer service charge is not a tax. It is a rate or charge for the privilege of using the sewer system, and all those, whether within or without the territorial limits of the city, who use the sewers, must pay for this service. Vacant property is exempt from the charge because no use is made of the sewers.[8]

The Supreme Court of Arkansas has passed upon this express question and has held that the sewer service charge is not a tax or assessment, but is a proper sewer service charge, in a case in which a city had contracted with a Housing Authority, not to levy taxes and assessments upon a housing project, acting under a statute permitting such contracts.[9]

Since appellants' places of business are located outside the city limits, they cannot be compelled to connect their properties to and use the city sewer system. If they desire to use the sewers, they must pay the legally established rates for sewer service. Appellants, on their theory, could equally well argue that they could use and refuse to pay for water provided by the Hot Springs Municipal Water System, or, if the city had a municipally owned light

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[7] Act of Ark. Feb. 21, 1903, Act 30, 2 Ark. Stat. annotated, Sec. 10-1123; Act Apr. 20, 1904, 33 Stat. 187, 16 U.S.C., Sec. 372.

[8] Act of Ark., March 21, 1933. Act 132 of 1933, Sec. 13, Vol. 2B, Ark. Stat. 1947 annotated, Sec. 19-4113. See appendix B-3, pp A-23, A-24, Statement as to Jurisdiction.

[9] *Housing authority of City of Blytheville* v. *City of Blytheville*, ___ Ark. ___, 310 S.W. 2d 222, 223, opinion delivered 2-24-58.

and power system, use electricity without paying for it, because they are located on Federal property, outside the municipal boundaries.

The decisions of this Court and other Courts cited by appellants in support of this theory have no application. These cases deal with taxation,[10] milk control measures,[11] civil penalties for default in delivery of telegram,[12] criminal offenses,[13] application of a state statute limiting hotel keepers liability,[14] construction of dams and generating facilities on public lands without permission,[15] application of state game laws,[16] obstruction of passage over public lands,[17] and application of state laws licensing massage operators.[18] Appellants have cited no decision holding that private businesses operating on federally owned territory are exempt from the payment of proper charges for their use of municipally owned utility systems because imposition of such charges violates Federal exclusive authority, jurisdiction, and immunity.

This case presents no substantial Federal Question as to Federal Authority, Jurisdiction or Immunity.

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10 *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U.S. 525; *Surplus Trading Company* v. *Cook*, 281 U.S. 647; *United States* v. *County of Allegheny*, 322 U.S. 174; *Buckstaff Bath House Company* v. *McKinley*, 308 U.S. 358; *McCulloch* v. *Maryland*, 4 Wheat (U.S.) 316; *Van Brocklin* v. *Tennessee*, 117 U.S. 151; *Kern-Limerick* v. *Scurlock*, 347 U.S. 110.

11 *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California*, 318 U.S. 285.

12 *Western Union Telegraph Co.* v. *Chiles*, 214 U.S. 274.

13 *Bruson* v. *United States*, 146 U.S. 525.

14 *Arlington Hotel Company* v. *Fant*, 278 U.S. 439; *Williams* v. *Arlington Hotel Company* (CCA 8th), 22 F. (2d) 669.

15 *Utah Power & Light Company* v. *United States*, 243 U.S. 389.

16 *Hunt* v. *United States*, 278 U.S. 96.

17 *McElroy* v. *United States*, 260 U.S. 353.

18 *Ludwig* v. *Nancy*, 223 Ark. 559.

II

Imposition of sewer service charges on appellants as a personal liability, and imposition of such charges outside the city's territorial limits does not deprive appellants of due process of law.

Appellants' argument on this point is based upon their interpretation of the Arkansas Statute authorizing the city to levy sewer service charges on persons using the sewers.[19] In essence, the contention is that sewer service charges, under this statute, are imposed only upon the landowner whose premises are connected to the sewer system, and not upon the tenant or other person who actually uses the system. Consequently, under appellants' peculiar circumstances, as tenants of the United States, imposition of these charges upon them, rather than the landowner, as personal liabilities is a denial of due process of law.

The act and the ordinances state: "It is the intention of this act that a landowner shall be liable for such service charge even though the use of the sewer system is by his tenant or lessee; . . ." and ". . . said charges to constitute a lien upon the fee title to the land and permanent improvements even though the occupant receiving the benefit of the service for which the rate or charge is due has merely a leasehold interest (or other lesser state) in the premises."

Even without court interpretation, it seems clear that the intent of the statute is to impose the burden of the sewer service charge upon the person using the service, whether owner, occupant or lessee. The legislature recognized, however, that tenants and lessees might be less responsible than landowners, and, as an ultimate security,

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[19] Act of Ark. March 21, 1933, Act 132 of 1933, Sec. 13, Vol. 2-B, Ark. Stat. 1947 annotated, Sec. 19-4113. See appendix B-3, pp A-23, A-24, Appellants' Statement as to Jurisdiction.

made the land finally responsible for the charge. The only proper interpretation of section 41-4113 and the ordinances enacted under its authority, is that the charge is levied against the user, and, if he will not pay or cannot be collected from, then the land itself serves as security.

The Supreme Court of Arkansas, in *Jernigan* v. *Harris*, 184 Ark. 705, a case testing the constitutionality of this sewer act, rendered in 1933 immediately after its enactment, has decided this issue adversely to appellants' position. The court there held that the act "providing for the sale of the fee for a service charge due by an occupant in possession under a lesser estate is not subject to the objection that one owner is required to discharge a burden which the law has imposed upon another".

The same question was argued extensively by the appellants in the instant case in the Supreme Court of Arkansas. While the Arkansas Court's opinion (appendix A-3, pp A-6—A-13, Statement as to Jurisdiction) does not mention this problem, the Arkansas Court must necessarily have decided that the sewer service charges could be imposed *in personam*, against the tenant using the sewer. Otherwise, the decree of the Arkansas Court rendering judgment against appellants would not have been entered.

The question of whether or not a state statute providing for sewer service charges provides for collection of such charges from a tenant or lessee as well as the owner of the premises is solely a matter of state law, to be determined by the Supreme Court of the State.[20] As long as these charges may be collected from all tenants under the terms of the statutes involved, there can be no violations of appellants' right to due process of law in collecting

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[20] See *Hebert* v. *Louisiana*, 272 U.S. 312, 71 L. Ed. 270, 47 S. Ct. 103.

the sewer service charges from them as tenants, and users of the sewer system.

The decisions of the Supreme Court of Arkansas in *Jernigan* v. *Harris*, *supra*, and in this case, necessarily apply to all tenants and lessees, not merely to the appellants here, and no substantial federal question as to due process of law is presented.

Appellants further argue that imposition of sewer service charges on users located outside the city and within the jurisdiction of another government deprives them of due process of law. As more fully set out in the discussion of Point No. 1, these charges are a utility charge for services rendered by the city and are applicable to all users of the system, whether within or without the limits of the system. Again, no substantial federal question is presented.

III

Imposition of Sewer Service Charges upon Appellants Does Not Deny Them Equal Protection of the Law

Appellants complain that they have been denied equal protection of law because they have been billed for sewer service charges by the city and the Sewer Committee, while other occupants of the Park, i.e. the Army & Navy General Hospital, the National Park Service Offices, the Government Free Bath House, the comfort stations in the Park, and the residences of the Park Superintendent and Assistant Superintendent (T.59-60, R.59) have not been billed for such sewer service charges.

The three decisions of this Court cited by appellants in support of their claim of denial of due process,[21] all

[21] *Morey* v. *Doud*, 354 U.S. 457; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389; *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U.S. 459.

deal with classifications within a statute itself which the Court held discriminatory and unjustified.

The state statute and the City Ordinances, by their terms apply to all users of the sewer system and contain no discriminatory classifications whatsoever. (See appendix B-1, B-2 and B-3, pp A-16—A-26, Appellants' Statement as to Jurisdiction.) No claims of denial of equal protection of law can be based upon the statute or ordinances.

The claim of denial of equal protection therefore, arises from the administrative action of the Sewer Committee in billing the appellants and not other occupants of the Park. No showing is made by appellants that the Sewer Committee has failed to charge any other users for use of the sewers except direct federally owned instrumentalities of the United States located on the Park. This is a purely administrative action of the Sewer Committee, not authorized by the Statute or the Ordinances, which falls far short of denial of equal protection to appellants.

This Court has held in *Mackay Telegraph & Cable Co.* v. *Little Rock*, 250 U.S. 94, 63 L. Ed. 863, 869, 39 S. Ct. 428,

> "Nor is there ground for holding that plaintiff in error is subjected to unreasonable discrimination, in contravention of the equal protection clause of the 14th Amendment. The case shows that its franchise ordinance imposes the same and no greater tax than that which is applied by a general ordinance to other companies maintaining poles in the city. The offer of testimony to prove that the two other companies were not in fact required to pay the tax upon so many of their poles as stood upon railroad rights of way went no further than to show that the general ordinance had not been enforced against them in the same manner that it

was proposed to enforce the franchise ordinance against plaintiff in error. There was no offer to show an arbitrary and intentionally unfair discrimination in the administration of the ordinance, as in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 374, 30 L. ed. 220, 227, 6 Sup. Ct. Rep. 1064. Peradventure the present action was a test case to determine whether the license fees were applicable to poles standing elsewhere than on the streets, with the intent, in case of an affirmative answer, to enforce the general ordinance against *the other* companies in the same sense. Nor was there any offer to show that the circumstances of the several companies and their telegraph lines were so much alike as to render any discrimination in the application of the pole tax equivalent to a denial of the equal protection of the laws."

As a matter of fact, the suggestion in the Mackay case, *supra*, that it might be a test case, fits this case. The Sewer Committee decided that it would take on the bath houses before it challenged the United States Government.

If appellants felt themselves aggrieved because they were charged for using the city's sewers and other occupants of the Park were not, a complete and adequate remedy was open to them in the Arkansas courts by way of a mandamas action to compel the Committee to charge the others. This remedy was not pursued.

No substantial Federal Question of Equal Protection of the Law is presented.

IV

The Obligation of the 1935 Contract Is Not Impaired

The 1935 contract between the Department of the Interior and the City of Hot Springs, upon which appel-

lants rely, provides for the payment by the United States of 27½% of the cost of the original sewage disposal system or the sum of $82,000.00, whichever was less, providing:

> "1. That the Government be not charged for any service or use of the system at any time in the future.
>
> 2. That the cost of all repairs, alterations and maintenance of the system be borne by other than United States Government sources."[23]

On the face of the agreement, it could be argued that appellants, as private businesses operating on the Park, are not "United States Government sources" within the meaning of the paragraph No. 2 of the proviso. This question is precluded by the decree of the Chancery Court of Garland County, Arkansas, rendered October 23, 1945, and not appealed, enjoining the collection of the 1.5-mill tax levied to pay the bonds issued for the 1935 sewage disposal system.[24] But this Chancery Court decision applied only to the 1.5-mill ad valorem tax, and had no possible application to sewer service charges not then levied, to pay for sewage disposal reconstruction not then in contemplation.

Even if it is conceded that appellants are United States Government sources under the terms of the 1935 contract, although they paid no part of the consideration, the contract could and did exempt appellants only from the 1.5-mill ad valorem tax for the original disposal system, and they can not claim any exemption from sewer service charges levied to pay for and maintain a new sewage disposal system required as a result of obsolescence and inadequacy of the original system.

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23 Agreement between United States Department of Interior and City of Hot Springs, March 25, 1935. See appendix B-4, pp A-26—A-38, Appellants' Statement as to Jurisdiction.

24 Stip. Exhibit 11, pp 53-54.

The Supreme Court of Arkansas, in its decision in this case, held that the contract was *ultra vires* . . ." ". . . in so far as it would estop or deny the City of Hot Springs the right and power, now or at any future time, in the exercise of its police powers to enforce collection of sewer charges against appellants".[25]

In support of its decision, the Arkansas Court cited the following language from *Risser* v. *City of Little Rock*, 225 Ark. 318, 281 S.W. 2d 949, Certiorari denied, 350 U.S. 965, 76 S. Ct. 433, 100 L. ed. 838, a case concerning a contract by the City for the permanent location of a city street:

> "A municipality cannot bind itself by a perpetual contract, or by one which lasts an unreasonable length of time. . . It is declared to be against public policy to permit a municipal corporation to part with any of its legislative power. In the absence of a clear grant of power from the legislature, the municipal authorities can do nothing which amounts in effect to the alienation of a substantial right of the public. It cannot obligate itself not to exercise such powers, and a contract in which it purports to do so, even upon valuable consideration, is void. Thus, a municipal corporation cannot, by contract or otherwise, divest itself of its general police power, or of the power of eminent domain which has been delegated to it by the legislature, or of the power of taxation."

The proposition that a city cannot permanently bargain away its governmental functions is not new to Arkansas Law. See *North Little Rock Water Co.* v. *Water Works Commission of Little Rock*, 199 Ark. 773, 136 S.W. 2d 194; *Delany* v. *Rucker*, 227 Ark. 869, 302 S.W. 2d 287.

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[25] Opinion, June 16, 1958—appendix A-3, p A-8, Appellants' Statement as to Jurisdiction.

The contract between the City and Federal Government mentioned in *Atkinson* v. *Pine Bluff*, 190 Ark. 65, 76 S.W. 2d 982, cited by appellants, involved a Federal contribution to a sewer system with the requirement that certain specified works must be constructed. It did not include any permanent, or even temporary, abrogation of the city's governmental powers, and the case has no application here.

In *Johnson* v. *Russell, Mayor*, 198 Ark. 49, 127 S.W. 2d 260, also cited by appellants, the Arkansas Court held that the city was specifically authorized to contract for Public Works Administration assistance by Act 132 of 1933, the very act whose application appellants now resist. No question of contracting away governmental powers was present and the case is not in point here.

In addition to its own prior decisions, the Arkansas Supreme Court in this case relied upon substantially similar decisions from other states, particularly *State ex rel Gordon* v. *Taylor*, 149 Ohio St. 427, 79 N.E. 2d 127, which held a contract between a city and the State University for perpetual exemption from sewer service charges in consideration of the grant of an easement across University property *ultra vires* and invalid.

If the contract was *ultra vires* and the City had no power to contract away in perpetuity its right to impose charges for the use of its sewers, as the Supreme Court of Arkansas has decided, basing its decision on well established Arkansas law, appellants' plea of impairment of the obligation of the contract is baseless. There can be no impairment of an invalid, *ultra vires* contract. See *Buffalo & Jamestown Railroad Co.* v. *Falconer*, 103 U.S. 821, 26 L. ed. 471; *Louisiana Western R. Co.* v. *City of Crowley*, 142 La. 640, 77 So. 486, error dismissed 249 U.S. 593, 39 S. Ct. 391, 63 L. ed. 793.

It is conceded, as appellants state, that the Supreme Court of the United States

> ". . . has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by state legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the state courts giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional state legislation." *Delmas* v. *Merchants Mutual Insurance Company*, 81 U.S. 661, 20 L. ed. 757.

But this Court has also said:

> ". . . we lean toward agreement with the courts of the state, and accept their judgment as to such matters (impairment of obligation of contracts) unless manifestly wrong." See *Hale* v. *Iowa State Board of Assessment and Review*, 302 U.S. 95, 101, 82 L. ed. 73, 76, and cases cited therein.

We submit that the decision of the Arkansas Supreme Court in this case, based as it is on prior Arkansas cases, far from being manifestly wrong, is manifestly right. No substantial Federal Question of impairment of the obligation of a contract is presented.

We respectfully submit therefore, that the appellants present no substantial Federal questions for the decision of this Court and that the appeals should be dismissed.

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